

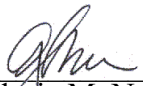


1 if he could correct that defect. In the amended complaint (#17), plaintiff still does not allege how  
2 his attorney acted under color of state law, other than a vague and conclusory statement that she  
3 conspired with the prosecutor and the arresting officer to prosecute him for complaining about being  
4 arrested. Without any allegations about how the three people conspired, that statement does not  
5 state a claim upon which relief can be granted. See Jones v. Community Redevelopment Agency,  
6 733 F.2d 646, 649 (9th Cir. 1984).

7 Furthermore, even if plaintiff's attorney did act under color of state law, this court  
8 cannot grant relief pursuant to 42 U.S.C. § 1983. In Atkins v. Kruse, 2:09-CV-01289-RCJ-(GWF),  
9 plaintiff alleges that he was convicted of one count of battery with the use of a deadly weapon in the  
10 state-court criminal proceeding at issue. In this action, plaintiff alleges that his attorney provided  
11 ineffective assistance of counsel. Such allegations, if proven, would necessarily imply that his  
12 conviction is invalid. "[T]o recover damages for allegedly unconstitutional conviction or  
13 imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction  
14 or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed  
15 on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to  
16 make such determination, or called into question by a federal court's issuance of a writ of habeas  
17 corpus." Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Because the conviction is still standing,  
18 plaintiff does not state a claim pursuant to 42 U.S.C. § 1983 upon which this court can grant relief.

19 IT IS THEREFORE ORDERED that this action is **DISMISSED** for failure to state a  
20 claim upon which relief can be granted. The clerk of the court shall enter judgment accordingly.

21 DATED this 14<sup>th</sup> day of October, 2010.

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25 Gloria M. Navarro  
26 United States District Judge  
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